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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

FILE:

Office: St. Louis (KAN)

Date: 07 JAN 2002

IN RE: Applicant:

APPLICATION:

Application for Permission to Reapply for Admission into the
United States after Deportation or Removal under Section
212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8
U.S.C. 1182(a)(9)(A)(iii)

IN BEHALF OF APPLICANT:

Public Copy

INSTRUCTIONS:

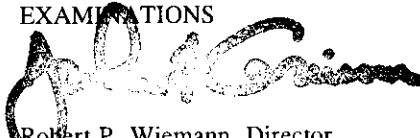
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Kansas City, Missouri, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was present in the United States without a lawful admission or parole as early as April 1990. When he was apprehended in September 1992, he was in possession of a counterfeit Form I-551 (in violation of 18 U.S.C. 1546, a felony) and U.S. Social Security card in his name which he purchased for \$30.00 and allowed him to obtain employment without Service authorization. The applicant was granted voluntary departure. The applicant was present again in the United States and without a lawful admission or parole in August 1993. On August 13, 1997, he was convicted of Involuntary Manslaughter-Vehicle and Assault-2nd Degree (both felonies). He was sentenced to 5 years imprisonment on each count to be served concurrently. On November 5, 1997, the applicant was encountered by the Service while in prison and again provided testimony that he had obtained employment without Service authorization by using his fraudulent Social Security card.

A Notice to Appear was served on him on February 23, 1998. On June 3, 1998, the applicant was ordered removed from the United States. An appeal of that decision by the Service contending that the crimes involved moral turpitude was dismissed by the Board of Immigration Appeals on April 7, 1999. The applicant was removed from the United States on June 25, 1999. Therefore he is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(9)(A)(ii). The applicant married a U.S. citizen on February 11, 1998, and he is the beneficiary of an approved petition for alien relative. The applicant seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. 1182(a)(9)(A)(iii), to rejoin his wife and two children.

The district director determined that the applicant did not warrant a favorable exercise of the Attorney General's discretion and denied the application accordingly.

On appeal, counsel has cited case law, Matter of L-O-G-, 21 I&N Dec. 413 (BIA 1996), relating to the issue of "extreme hardship" as that term applied in matters involving suspension of deportation under former section 244 of the Act, 8 U.S.C. 1254, prior to its amendment by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, and recodification under section 240A of the Act, 8 U.S.C. 1229b, and redesignation as "cancellation of removal." The present matter involves permission to reapply for admission and a showing of extreme hardship is not required.

On appeal, counsel states the Service erred in finding that the applicant is a person who does not possess good moral character. Counsel referred to the reference to the term "good moral character" as used in Title III (citizenship) at section 101(f)(7) of the Act. Counsel states that Congress did not proscribe any period for which an alien must demonstrate his good moral character

in seeking permission to reapply for admission. Counsel argues that the crime the applicant committed did not constitute a crime of moral turpitude. (The two counts were considered 3rd degree felonies by the court). He served his sentence and was released on good behavior.

Section 101(f)(6) of the Act indicates that such a person as described above is one who has given false testimony for the purpose of obtaining any benefits under this Act.

In 1986, Congress expanded the reach of the ground of inadmissibility in the Immigration Marriage Fraud Amendments of 1986, P.L. No. 99-639, and redesignated as section 212(a)(6)(C) of the Act by the Immigration Act of 1990 (Pub. L. No. 101-649, Nov. 29, 1990, 104 Stat. 5067) effective June 1, 1991. Congress imposed the statutory bar on (a) those who made oral or written misrepresentations in seeking admission into the United States; (b) those who have made material misrepresentations in seeking entry admission into the United States or "other benefits" provided under the Act; and (c) it made the amended statute applicable to the receipt of visas by, and the admission of, aliens occurring after the date of the enactment based on fraud or misrepresentation occurring before, on, or after such date.

In 1990, section 274C of the Act, 8 U.S.C. 1324c, was inserted by the Immigration Act of 1990 (P.L. 101-649, Nov. 29, 1990, 104 Stat. 5059), effective for persons or entities that have committed violations on or after November 29, 1990. Section 274C(a) provided penalties for document fraud stating that it is unlawful for any person or entity knowingly "(2) to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this Act,..."

In 1994 Congress passed the Violent Crime Control and Law Enforcement Act (P.L. 103-322, September 13, 1994), which enhanced the criminal penalties of certain offenses, including 18 U.S.C. 1546:

(a)...Impersonation in entry document or admission application; evading or trying to evade immigration laws using assumed or fictitious name...knowingly making false statement under oath about material fact in immigration application or document....

(b) Knowingly using false or unlawfully issued document or false attestation to satisfy the Act provision on verifying whether employee is authorized to work.

In Matter of Serna, 20 I&N Dec. 579 (BIA 1992), the Board held where the alien was convicted of knowingly possessing an altered immigration document but did not use it, that alien had not committed a crime involving moral turpitude. However, the alien was applying for discretionary relief, and the immigration judge determined that the alien did not merit a favorable exercise of

discretion. The immigration judge considered the alien's action a serious adverse factor.

To recapitulate, the applicant in the present matter knowingly purchased a counterfeit Form I-151 and U.S. Social Security card and used that documentation to obtain employment by fraud without Service authorization. He was employed by Sun Mark Manufacturers in St. Louis from 1994 into 1997. Although the applicant's actions may not be considered a crime involving moral turpitude, a violation of 18 U.S.C. 1546(b) is a felony and a very unfavorable factor in this matter.

On appeal, counsel states that the Service failed to give sufficient weight to the impact of separation of the applicant and his family and the burden on the community by his wife's and child's current reliance on public assistance.

The record contains a statement from the applicant's wife in which she discusses her hardships, lack of work experience, inability to drive a car, her disabled father who is unemployed, her mother who takes care of him, her inability to visit the applicant in Mexico, their daughter who is attending a magnet school, and the emotional and financial hardship of separation.

Section 212(a) (9) (A) of the Act provides, in part, that:

(i) Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 of the Act or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

Section 212(a)(9)(A)(ii) of the Act provides that aliens who have been otherwise ordered removed, ordered deported under former sections 242 or 217 of the Act, 8 U.S.C. 1252 or 1187, or ordered excluded under former section 236 of the Act, 8 U.S.C. 1226, and who have actually been removed (or departed after such an order) are inadmissible for 10 years unless the Attorney General has consented to the alien's reapplying for admission. The provision holding aliens inadmissible for 10 years after the issuance of an exclusion or deportation order applies to such orders rendered both before and after April 1, 1997.

Section 212(a)(6)(B) of the Act, 8 U.S.C. 1182(a)(6)(B), was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and is now codified as section 212(a)(9)(A)(i) and (ii). According to the reasoning in Matter of Soriano, 21 I&N Dec. 516 (BIA 1996, A.G. 1997), the provisions of any legislation modifying the Act must normally be applied to waiver applications adjudicated on or after the enactment date of that legislation, unless other instructions are provided. IIRIRA became effective on September 30, 1996.

An appeal must be decided according to the law as it exists on the date it is before the appellate body. In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. Matter of George, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

In IIRIRA, Congress imposed restrictions on benefits for aliens, enhanced enforcement and penalties for certain violations, eliminated judicial review of certain judgments or decisions under certain sections of the Act, created a new expedited removal proceeding, and established major new grounds of inadmissibility. Nothing could be clearer than Congress's desire in recent years to limit, rather than to extend, the relief available to aliens who have violated immigration law. Congress has almost unfettered power to decide which aliens may come to and remain in this country. This power has been recognized repeatedly by the Supreme Court. See Fiallo v. Bell, 430 U.S. 787 (1977); Reno v. Flores, 507 U.S. 292 (1993); Kleindienst v. Mandel, 408 U.S. 753, 766 (1972). See also Matter of Yeung, 21 I&N Dec. 610, 612 (BIA 1997).

Although the Service promulgated guidelines for considering permission to reapply for admission applications in Matter of Tin, 14 I&N Dec. 371 (Reg. Comm. 1973), and in Matter of Lee, 17 I&N Dec. 275 (Comm. 1978), these holdings were rendered long before Congress amended the Act from 1981 through the present 1996 IIRIRA amendments and beyond. Even though these decisions have not been overruled, Congress and the courts following the 1981 amendments and onward have clearly shown in the legislation and in their decisions that individuals who violate immigration law are viewed

unfavorably. The later statutes and judicial decisions have effectively negated most precedent case law rendered prior to 1981. Such case law is still considered but less weight is given to favorable factors gained after the violation of immigration laws following statutory changes and judicial decisions.

Even the Regional Commissioner in Tin held that an alien's unlawful presence in the United States is evidence of disrespect for law. The Regional Commissioner noted also that the applicant gained an equity (job experience) while being unlawfully present subsequent to that return. The Regional Commissioner stated that the alien obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country. The Regional Commissioner then concluded that approval of an application for permission to reapply for admission would appear to be a condonation of the alien's acts and could encourage others to enter without being admitted to work in the United States unlawfully.

After reviewing the 1996 IIRIRA amendments to the Act and prior statutes and case law regarding permission to reapply for admission, and after noting that Congress has increased the bar to admissibility from 5 to 10 years, has also added a bar to admissibility for aliens who are unlawfully present in the United States, and has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted, it is concluded that Congress has placed a high priority on reducing and/or stopping aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

It is appropriate to examine the basis of a removal as well as an applicant's general compliance with immigration and other laws. Evidence of serious disregard for law is viewed as an adverse factor. Family ties in the United States are an important consideration in deciding whether a favorable exercise of discretion is warranted. Matter of Acosta, 14 I&N Dec. 361 (D.D. 1973).

The Service, following more recent judicial decisions, has accorded less weight to an applicant's equities gained after an unlawful entry or a deportation order is entered. The statute provides in section 240 of the Act, 8 U.S.C 1229, for the consideration of a certain amount of continuous physical presence in the United States for aliens seeking cancellation of removal. The present applicant is not seeking cancellation of removal.

The court held in Garcia-Lopez v. INS, 923 F.2d 72 (7th Cir. 1991), that less weight is given to equities acquired after a deportation order has been entered. Further, the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of deportation proceedings, with knowledge that the alien might be deported. Ghassan v. INS, 972 F.2d 631 (5th Cir. 1992), cert. denied, 507 U.S. 971 (1993). It

is also noted that the Ninth Circuit Court of Appeals in Carnalla-Muñoz v. INS, 627 F.2d 1004 (9th Cir. 1980), held that after-acquired equities, referred to as "after-acquired family ties" in Matter of Tijam, Interim Decision 3372 (BIA 1998), need not be accorded great weight by the district director in considering discretionary weight. The applicant in the present matter entered the United States unlawfully in April 1990, was in possession of a counterfeit immigration document, was voluntarily returned to Mexico, unlawfully reentered the United States in August 1993, was convicted of two felonies in August 1997 and was sentenced to 5 years imprisonment, married his spouse in February 1998 and was removed in June 1999. He now seeks relief based on that after-acquired equity.

The favorable factors in this matter are the applicant's family ties, the need for the applicant's presence to care for his wife and a minor child, the approved petition for alien relative, and the prospect of general financial and emotional hardship to the family.

The unfavorable factors in this matter include the applicant's unlawful entries, his commission of at least three felonies and conviction for committing two felonies, his employment without Service authorization, his being ordered removed, and his lengthy presence in the United States without a lawful admission or parole. The Commissioner stated in Matter of Lee, supra, that residence in the United States could be considered a positive factor only where that residence is pursuant to a legal admission or adjustment of status as a permanent resident. To reward a person for remaining in the United States in violation of law would seriously threaten the structure of all laws pertaining to immigration.

The applicant's actions in this matter cannot be condoned. His equity (marriage) gained following his second unlawful entry and while being unlawfully present in the United States can be given only minimal weight. The applicant has committed violations which are very serious adverse actions. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

In discretionary matters, the applicant bears the full burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. See Matter of T-S-Y-, 7 I&N Dec. 582 (BIA 1957); Matter of Ducret, 15 I&N Dec. 620 (BIA 1976). After a careful review of the record, it is concluded that the applicant has failed to establish he warrants the favorable exercise of the Attorney General's discretion. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.